

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION CONFERENCE COMMITTEE ON SENATE AMENDMENTS TO HOUSE BILL 266

Call to Order: By **CHAIRMAN KEN MILLER**, on April 10, 2001 at 9:00 A.M., in Room 152 Capitol.

ROLL CALL

Members Present:

Sen. Ken Miller, Chairman (R)
Sen. Sam Kitzenberg (R)
Sen. Emily Stonington (D)
Rep. Jim Shockley (R)
Rep. Gilda Clancy (R)
Rep. Paul Clark (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Staff
Mary Lou Schmitz, Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted:
Executive Action: **HB 266**

Senator Miller opened the Conference Committee by asking **Rep. Clancy** to discuss her reasons for putting the amendment back on. **Rep. Clancy** said subsection (3 is not important and would like to substitute that section with a different subsection that reads similar to what used to be subsection (4). **The language would read "An applicant may enforce this section in district court. If the court determines that the government entity has not complied with the above requirements "to existing law", or that the government act is not authorized by the authority cited by the government entity in the statement of legal authority, the court shall award damages, costs, and attorney fees to the applicant."**

The above is a motion by Rep. Clancy.

Discussion: Rep. Shockley asked Rep. Clancy why she wanted to add that. Rep. Clancy said there are situations arising between the government action and the statement of legal authority that is requested. Administrative rules could come into play and by adding "to existing law", it will not change anything from the time the government action is actually taken.

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Rep. Clark asked if a government agency is paying the bill then where is the money coming from? He feels the government agencies are not independently wealthy so he had a hard time with the concept of one taxpayer paying for legal action taken by another taxpayer. That is why he supports the Senate amendments.

Valencia Lane, Staff, said she wondered if this is in the authority of the Conference Committee or if a Free Conference Committee is needed. This is modifying the amendments and actually changing the language. She said this is something the Free Conference Committee should do to amend the Bill. The Conference Committee can accept, reject or modify the amendments.

Rep. Clancy asked Ms. Lane if they could re-instate the language in subsection (4) as its written? Ms. Lane said she thought they could do that.

Senator Stonington said she visited with Senator Grosfield about the discussion that had occurred in the Senate Judiciary Committee about this Bill and he said they very deliberately did what they did because they felt that this language was punitive and excessive. You can already, through a writ of mandamus, require a government agency to comply with the language used in the first part of this Bill, which is existing law, so she will not agree with putting this language back in.

Rep. Shockley cited a personal experience with state agencies and said for the average citizen, without the wherewithal to hire an attorney to enforce his rights, will find it meaningless and expensive. The taxpayers should not have to pay to make the agencies available.

Senator Stonington said the way she reads the language, what they are asking the agency to do is to write a letter specifying which statute they have made their judgement on. That, in her opinion, does not get what they are talking about.

Rep. Shockley said if they cite the wrong statute or refuse to answer, as he cited in his personal experience, the only remedy is to go to Court. If they don't respond he feels the taxpayer should not have to pay for it.

Rep. Clark voiced his concern that the funding for any costs would come from the taxpayers and he does not see any additional funding coming through this Bill. The Agency is not being held accountable. The general public is being held accountable for an Agency's action or inaction.

Rep. Shockley said if the Agency is within the law, there is no problem.

Motion: **Rep. Clancy** moved a substitute motion to re-instate the language in subsection 4 and add "it is reciprocal".

Ms. Lane said that is closer to being within the scope than the other motion.

Rep. Shockley, after conferring with **Michael Kakuk, Attorney, HPOA**, without objection, stated there is a statute now that makes it reciprocal. **Mr. Kakuk** said not to his knowledge. There are specific statutes where a prevailing party may be awarded attorney's fees in the interest of justice.

Rep. Shockley said Senator Stonington is right. They do not want to encourage frivolous litigation.

Senator Miller said he would support putting this language back in and/or amending it as **Rep. Clancy** stated. It is obvious that if it is an improper statement or wrongfully done, we can't hold the employee responsible so then we have to hold the taxpayer responsible because that employee is representing the taxpayer in the first place.

Senator Stonington said in the motion on the floor now, we are not looking at statement (3) so therefore, the government act may be taken during this litigation. So it basically allows an applicant, if they have not received a written explanation to their satisfaction of why the government act is being taken, may sue and if they win, the government is required to pay their legal fees and if they lose, they are required to pay the government's legal fees.

Rep. Clancy said she agreed but would add, that after that government act is taken the applicant has to make a written request for the reason why the government act has been taken. Then if that doesn't satisfy the applicant, she doesn't believe

that these rules or regulations have been cited in the statement. Then at that point, he/she can take it to district court.

Senator Stonington said the person requesting this explanation has to make that request in writing. The government then has to respond in writing what is the specific statute. Then the person, if still unsatisfied, can go to court. She is not in favor of this.

Rep. Clark asked **Rep. Clancy** if she is accomplishing what she wants with this amendment or does it defeat the purpose of the Bill? **Rep. Clancy** said yes to the first question.

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Ms. Lane pointed out that the Bill, as originally drafted, and the Title of the Bill did not discuss the granting or the award of attorneys' fees and costs and that it could be argued that the concept was outside the Title of the original Title and scope of the Bill and putting it back in would still be a problem. One of the discussions in the Senate Judiciary Committee was the actual language of subsection (4) where it states the "applicant is entitled to recover damages resulting from an improper statement of legal authority". She is not sure what that actually means as opposed to if there was a mere clerical error. What does "improper" mean and then what are the damages that actually result from the statement. The concerns in the Senate Judiciary Committee were certainly the concept.

Ms. Lane said she has come up with, in terms of an amendment, on Page 1, line 28, following line 27, reinsert a new section (3) and it would be the same language as in the (4), stricken. She would word it with a new sentence at the end of (4) that would say "an applicant who contests a written statement of legal authority in district court and does not prevail shall pay the government entities, costs and attorneys' fees".

Senator Miller commented that it does fit under the Title of the Bill because revising the Government Accountability Act is broad enough to handle it.

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Senator Miller said he believes both juries and judges routinely determine damages. **Ms. Lane** said that is true. Her concern is if it is properly worded. **Senator Stonington** asked if they could make the wording for (4) "an applicant may contest a written statement of legal authority in district court. If the applicant

prevails, the applicant must be granted costs and attorney's fees" and then **Ms. Lane's** sentence.

Rep. Clancy withdrew her last substitute motion.

Motion: Rep. Clancy moved the amendment which states "Page 1, line 28, following line 27, insert subsection (3) an applicant may contest a written statement of legal authority in district court. The prevailing party shall be awarded costs and attorney's fees incurred in a contest or defense under this section".

Discussion: Reps. Shockley, Clancy, Clark, Senators Miller and Stonington concerning damages and costs and explanations of both.

Vote: Clancy motion carried 4-2 with Senator Stonington and Rep. Clark voting no.

{Tape : 1; Side : B; Approx. Time Counter : 0.1 - 16.4}

ADJOURNMENT

Adjournment: 9:45 A.M.

SENATOR KEN MILLER, Chairman

Mary Lou Schmitz, Secretary

KM/mls

EXHIBIT (cch81hb0266aad)